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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 155

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF

Of Transportation-Communication Division, Brotherhood of Railway, Airline and Steamship Clerks, Etc., Et Al., Petitioners

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INDEX

	Page
Supplemental Brief	1
Conclusion	5
Appendix A	A-1
Appendix B	A-2
Appendix C	A-7
Appendix D	A-13
Appendix E	A-15

Cases Cited

Gibson v. Thompson, Trustee, certiorari granted, case reversed and remanded per curiam, 355 U. S. 18 (1957), rehearing denied, 355 U. S. 900 (1957)	2
Thompson v. Gibson, 290 S. W. 2d 305 (1956), 298 S. W. 2d 97 (1957)	2
Thompson v. Gibson, 310 S. W. 2d 564 (1958)	2

Statutes and Rules Cited

Federal Rules of Civil Procedure:	
Rule 73	4
Rule 5	4
28 USC, 1254	2, 4
28 USC, 1291	2, 4
28 USC, 1292 (b)	4
45 USC, 153 First (q) (1970 Supp.)	2, 4

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The importance of this Court reviewing the decision of the Court below in this case is further demonstrated by additional proceedings in *Gibson v. Missouri Pacific R.*

Co., to which reference was made at page 4 of Petitioner's Reply Brief, which have come to the attention of counsel for petitioner since that brief was filed.

The first question presented in this case (Ptn. p. 2)—whether a decision of a District Court remanding a minor dispute to the National Railroad Adjustment Board is subject to appellate review by a Court of Appeals under the provisions of Section 3, First (q) of the Railway Labor Act, 45 USC 153 First (q) (1970 Supp.) and 28 USC 1254 and by this Court under Section 3, First (q) of the Railway Labor Act and 28 USC 1291—is now pending before the Court of Appeals for the Fifth Circuit in the *Gibson* case in which the Court of Appeals for the Fifth Circuit has not entered any order either assuming or denying jurisdiction (App. A-1 to A-7) as well as in *United Transportation Union v. Illinois Central R. Co.*, in the Court of Appeals for the Seventh Circuit, to which reference was made at pages 11-12 of the Petition filed in this case; that case is set for oral argument on September 25, 1970.

In the *Gibson* case an employee of the New Orleans, Texas & Mexican Railroad Company recovered a judgment under the Federal Employer's Liability Act for damages for personal injuries as appears from *Thompson v. Gibson*, 290 S. W. 2d 305 (1956); 298 S. W. 2d 97 (1957); *Gibson v. Thompson, Trustee, certiorari granted, case reversed and remanded per curiam*, 355 U. S. 18 (1957); *rehearing denied*, 355 U. S. 900 (1957) and *Thompson v. Gibson*, 310 S. W. 2d 564 (1958), App. A-3.

Thereafter, on October 31, 1963, the National Railroad Adjustment Board, First Division, made an award denying Gibson's grievance for reinstatement to employment by the railroad on the ground he was estopped from maintaining such grievance by reason of the allegations and

proof made in his personal injury action and on March 18, 1964 rendered an interpretation of that award (App. A-4).

On June 1, 1966, more than two years after the award and interpretation were made by the National Railroad Adjustment Board, First Division, Gibson commenced an action in the United States District Court for the Eastern District of Texas, Beaumont Division (App. A-4, A-5), to review and set aside the award and the interpretation of the award by the National Railroad Adjustment Board, First Division, notwithstanding the Act did not, at that time, provide for actions to review such awards (*Washington Terminal Co. v. Boswell*, cited at page 2 of Petitioner's Reply Brief herein) and sub-section (q) of Section 3 First of the Act (45 USC 153, First (q) at that time provided that actions to enforce awards of the Board ". . . shall be begun within two years . . ."; which provision was re-enacted as sub-section (r) of Section 3, First of the Act, on June 20, 1966 as part of Public Law 89-456, which also provided in sub-section (q) of Section 3, First for actions to *review* awards of the National Railroad Adjustment Board, 45 USC 153, First (q), (r), (1970 Supp.), (App. A-4, A-5).

The District Court, ignoring the contention of the railroad with respect to the statute of limitations (App. A-5), on June 17, 1970 remanded the dispute to the National Railroad Adjustment Board with instructions "to make new and appropriate findings as to the nature and extent of Gibson's present disability, if any, to work as a locomotive engineer and as to whether he has been wrongfully withheld from service in violation of the contract between the union and the railroad" (App. A-7 to A-12).

On July 10, 1970 the District Court granted the railroad's motion to permit the railroad to appeal from the decision remanding the dispute as an interlocutory decision under the provisions of 28 USC 1292 (b) because

"there may be a question whether [the District Court's decision] is an appealable order" (App. A-13 to A-14).

The question whether the District Court's decision was an appealable order existed by reason of the decision of the Court below in this case and was the occasion for the railroad's motion to permit an appeal from that decision as an interlocutory decision under the provisions of 28 USC 1292 (b), notwithstanding the District Court considered its decision to be subject to appellate review (App. A-2 to A-3, A-13 to A-14).

On July 16, 1970, the railroad filed the usual notice of appeal under the provisions of 28 USC 1254 and Rule 73 of the Federal Rules of Civil Procedure from the decision of the District Court on June 17, 1970 as amended by its order of July 10, 1970 (App. A-15).

Also, on July 17, 1970 the railroad, under the provisions of 28 USC 1292 (b) and Rule 5 of the Federal Rules of Appellate Procedure, filed in the United States Court of Appeals for the Fifth Circuit, its petition for permission to appeal from the decision of the District Court as an interlocutory order and to consolidate such appeal with the appeal it had taken "as of right" under Section 3, First (q) of the Railway Labor Act (45 USC 153, First (q) (1970 Supp.)) and 28 USC 1291 (App. A-1 to A-14).

It is therefore apparent that the resolution by this Court of the question whether a decision of a District Court remanding a minor dispute to the National Railroad Adjustment Board is subject to appellate review as a matter of right under the provisions of subsection (q) of Section 3, First of the Railway Labor Act, 45 USC 153, First (q) (1970 Supp.) and the provisions of 28 USC 1291 and 1254 could well avoid a Petition for a Writ of Certiorari to review a decision which may be made by the Court of Ap-

peals for the Fifth Circuit in the *Gibson* case or by the Court of Appeals for the Seventh Circuit in *United Transportation Union v. Illinois Central R. Co.*

CONCLUSION

For the reasons stated in the Petition and Petitioner's Reply Brief and in this Supplemental Brief, the Writ of Certiorari should be granted.

Respectfully submitted

JOHN H. HALEY, JR.
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St. Louis, Missouri 63101
Counsel for Petitioners

September 4, 1970.

APPENDIX A

United States Court of Appeals
Fifth Circuit

Office of the Clerk

July 17, 1970

Re: Misc. No. 1774 Missouri Pacific Railroad Co. vs. J. L. Gibson

(1) Petition for permission to appeal from an interlocutory order.

(2) July 24, 1970.

Dear Sir:

I am authorized by this Court to advise that the above (1) has been received and filed, and under the rules and practice of this Court will be presented for ruling without oral argument on the date shown in column (2) above, together with any response or opposition that may be filed by opposing counsel by that date.

Very truly yours

EDWARD W. WADSWORTH
Clerk

APPENDIX B

In the United States Court of Appeals
Fifth Circuit

No. .....

Missouri Pacific Railroad Company,
Appellant,

vs.

J. L. Gibson,
Appellee.

From the United States District Court,
Eastern District of Texas,
Beaumont Division

RAILROAD'S PETITION FOR PERMISSION TO APPEAL AS FROM AN INTERLOCUTORY ORDER

To the Honorable Court of Appeals:

Now comes Missouri Pacific Railroad Company, hereinafter designated the Railroad, and files this, its Petition for leave to appeal under 28 U. S. C., Sec. 1292(b) and Rule 5 of the Rules of Appellate Procedure, and as grounds therefor, shows to the Court the following:

I. Preliminary Statement

On June 1, 1966, J. L. Gibson, as Plaintiff, instituted in the United States District Court for the Eastern District of Texas, Beaumont Division, a certain Civil Action, designated Civil Action No. 5176, against Missouri Pacific Railroad Company, a corporation, as Defendant; and this suit remained pending until June 17, 1970, on which

date the said Court (Hon. Joe J. Fisher, Judge) entered its Memorandum Opinion and Order, a true copy of which is appended hereto as Exhibit A. Thereafter, the said Court amended that Order by an Order entered on July 10, 1970, a true copy of which is appended hereto as Exhibit B. The Railroad believes that the said Order, so amended, is a final judgment, which is appealable as of right under Sec. 1291 of Title 28 of the U. S. Code, and the Railroad has given Notice of Appeal and made bond in the usual manner, for an appeal as of right from those orders. However, it is felt that some question may exist about this because of the different opinion expressed by the Court of Appeals for the 8th Circuit in the case of *Transportation-Communication Division—Brotherhood of Railway, Airline and Steamship Clerks, etc. v. St. Louis-San Francisco Ry. Co.*, 419 F. (2) 922 (1970). In view of this Court's own precedent in the case of *Southern Pacific v. Wilson*, 378 F. (2) 533 (5th Cir. 1967), the Railroad is also seeking permission to take an interlocutory appeal, from the same orders, under Sec. 1292(b) and Appellate Rule 5, in this manner, in an effort to make doubly sure that its appeal will in fact be accepted and entertained, under one section or the other. The Court is requested to allow the interlocutory appeal under Section 1292(b), and consolidate it with the appeal as of right under Section 1291.

II. Statement of Facts Necessary to an Understanding of the Controlling Questions of Law

Plaintiff Gibson, who last worked for Defendant Railroad on January 5, 1951, recovered a judgment against the Railroad for damages for an injury suffered on December 5, 1950. His suit for personal injuries is reported as follows: [as stated in the body of this Brief].

* * * * * * *

The Railroad paid the judgment on March 17, 1958, and shortly thereafter, on July 1, 1958, Plaintiff Gibson demanded that the Railroad put him back to work. The Railroad refused to do so, however, and he has never resumed work for Defendant Railroad. He made a grievance over that, under the collective bargaining agreement, and the Railroad defended itself by contending that he is estopped to deny that he is permanently disabled for railroad work because he prosecuted to successful conclusion a claim of permanent disability, and he collected in full from the Railroad the amount of money that the Court had assessed in the suit which he brought himself for that purpose. The First Division of the NRAB, by its Award No. 20369, dated October 31, 1963, and its Interpretation thereof, dated March 18, 1964, upheld the Railroad's contention in this respect, but held that the Railr road should continue to carry him on the posted seniority lists, thus preserving his eligibility for retirement benefits. Plaintiff Gibson's name is being carried on the seniority list with a notation "Disabled."

On April 23, 1965, Plaintiff Gibson filed suit in the State Court in Anderson County, Texas (at Palestine, Texas) against his Union and its General Chairman, L. D. Johnson, alleging that they had intentionally caused him to lose his employment with the Railroad and his right to enforce his rights against the Railroad, and seeking to collect damages for this from them. On March 31, 1966, without a full trial on the merits, the State Court rendered a summary judgment that Plaintiff Gibson take nothing by his suit against his Union and its General Chairman; and thereupon plaintiff Gibson took an appeal to the Texas Court of Civil Appeals at Tyler.

Meanwhile, pending his appeal in the State Courts, Plaintiff Gibson filed the present suit in Federal Court on June 1, 1966, to review and set aside the Award of the

N. R. A. B., which had been rendered on October 31, 1963. However, it was not until a few weeks later, on June 20, 1966, that House Resolution 706, authorizing such a suit, was actually approved as Public Law 89-456.

On March 30, 1967, the Texas Court of Civil Appeals at Tyler, in *Gibson v. Johnson*, 414 S. W. (2) 235, upheld the decision of the State District Court.

* * * * * * *

Plaintiff Gibson then applied to the Supreme Court of Texas for a Writ of Error, but his application was refused on July 26, 1967.

* * * * * * *

Thereafter, Plaintiff Gibson petitioned the Supreme Court of the United States for a Writ of Certiorari, and that petition was denied on March 4, 1968 [*Gibson v. Johnson*, 300 U. S. 946].

In the present suit, which was not filed until June 1, 1966, to set aside an Award rendered in 1963, the Defendant Railroad pleaded numerous defenses, including the two-year statutes of limitation. One of these statutes was Sec. 153, First, (q) of Title 45 of the U. S. Code, until June 20, 1966, and became Sec. 153, First, (r) on and after June 20, 1966, by virtue of Public Law 89-456.

* * * * * * *

The District Court has made no express finding that these statutes do not apply, but evidently so concluded; because it proceeded to entertain the suit and grant relief without regard to any bar created by those statutes.

* * * * * * *

V. Reasons Why an Immediate Appeal May Materially Advance the Termination of the Litigation

The District Court's Opinion and Order (Exhibit A) does not permit the N. R. A. B., after taking additional evidence, to again decide that Plaintiff Gibson is estopped to deny that he is permanently disabled from Railroad work. It requires the Board to make a different disposition of the case by determining the nature and extent of his disability as of some future date. This would evidently require the N. R. A. B. to institute lengthy new procedures, which might very well result in three separate medical examinations, and a sort of three-doctor medical arbitration, merely in order to determine the nature and extent of Plaintiff Gibson's actual disabilities, when those procedures would be entirely unnecessary if the previous award is ultimately to be upheld, whenever an appeal can be taken according to law.

Conclusion and Prayer

Wherefore, premises considered, the Railroad requests that it be granted permission to take an interlocutory appeal, under Section 1292(b), and Appellate Rule 5, from the Memorandum Opinion and Order (Exhibit A), as amended (Exhibit B), and that such appeal be consolidated with its appeal as of right under Section 1291 and Appellate Rule 4.

* * * * * * *

APPENDIX C

EXHIBIT A

In the District Court of the United States
For the Eastern District of Texas
Beaumont Division

J. L. Gibson,
Plaintiff,
vs.
Missouri Pacific Railroad Company,
Defendant.
} Civil No. 5176.

* * * * * * *

Memorandum Opinion and Order

This case arises out of a controversy that is nearly twenty years old. The plaintiff, J. L. Gibson, became an employee of the defendant, Missouri Pacific Railroad Company, in 1927, and held the position of locomotive engineer when, on December 5, 1950, he suffered personal injuries while in the course of his employment. This incident was the basis of a suit for damages pursuant to the Federal Employers' Liability Act, 45 U. S. C., § 51, et seq., which was filed in the District Court of Harris County, Texas, in December of 1952. Upon the trial of that case, Gibson recovered a judgment of $32,500.00, plus interest. There ensued a series of appeals culminating some five years later in a sustention of Gibson's claim by the United States Supreme Court. The judgment with accumulated interest was finally paid on March 17, 1958.

Subsequently, on July 1, 1958, Gibson requested that Missouri Pacific return him to work as a locomotive en-

gineer, which request was refused. He then instituted a grievance proceeding in accordance with the Rules and Working Conditions Agreement which, pursuant to the provisions of the Railway Labor Act, 45 U. S. C., § 151, et seq., was in effect between Missouri Pacific and Gibson's union, the Brotherhood of Locomotive Engineers. Gibson claimed that he should be returned to service and paid for all time lost since July 1, 1958. As is customary in disputes of this nature, the case was at all times handled by union officials. Procedures for settlement of grievances "on the property" were exhausted to no avail, and, as provided for by the Act, the union submitted the unresolved dispute to the appropriate division of the National Railroad Adjustment Board.

At this point Missouri Pacific interposed the objection that the case was not timely filed according to the rules of the Board, and this question was severed from the basic controversy for determination by a Special Board of Adjustment. A referee was appointed to sit with the Special Board in order to break a deadlock between the union and carrier representatives, and the decision was that the dispute had not been timely filed. The effect of this determination under NRAB rules was to bar Gibson's claim for back pay but not to deprive the Board of jurisdiction to determine whether the employee had been wrongfully denied a return to service.

The remaining portion of the dispute was then taken up by the First Division of the Board. It was required that another referee be appointed to cast a deciding vote. The Division found that the Railroad was wrong in terminating Gibson's employment and should continue to carry him on the posted seniority lists, thus preserving his eligibility for retirement benefits. However, the Division declined to order a return to service. Referring

to Gibson's FELA suit against Missouri Pacific, the award found that,

> "Claimant technically has not been discharged by the carrier but has been paid in advance what the court found to be due him for being permanently deprived of his work."

The position thus taken by the Division was that, having prosecuted to successful conclusion a claim of permanent disability, Gibson is now estopped to assert his ability to return to work for the same employer.

* * * * * * *

Gibson has now brought this action under 45 U. S. C., § 153 (g), seeking to have this Court set aside the NRAB award.

* * * * * * *

Basically what Gibson contends is that the Board has mishandled his claim. He contends that his case is essentially a disciplinary case in that it arose out of his claim that the Railroad had discharged him as punishment for prosecuting his FELA suit. The labor contract calls for two types of arbitration, disciplinary and medical. Gibson contends that this dispute was not handled according to either procedure. If it was a medical case, the Board could not arbitrarily, without prescribed medical arbitration, decide that Gibson was a disabled or unsafe employee. If it was a disciplinary case, then Gibson contends that the Board's finding that his employment relationship was improperly terminated by the Railroad entitles him to a decree implementing his right to return to work. Plaintiff argues that the Railroad has accomplished by this "improper" award what it could not do under federal law and the relevant labor contravts (sic): punishment of an employee for pursuing his FELA claim against his employer.

* * * * * * *

Plaintiff argues, however, that there is no basis in fact or law for application of estoppel in this case because Gibson realized only a limited recovery in his FELA suit "which would have no relevance to the amount recoverable for total and permanent disability." This contention is not without substance. The First Division had before it evidence that Gibson's earning capacity, amounting to $6,000.00 per year, as measured against a verdict of only $32,500.00, would indicate that the jury only awarded lost earnings for a period of about five years of his life. Furthermore, when it is considered that there was also a claim for pain and suffering, past and future, the award would certainly not seem to reflect a determination of total and permanent disability. An interpretation of Gibson's award was issued by the First Division at the Union's request. The Referee's opinion stated as follows:

> "3. It was the opinion of the Referee that termination of the claimant's employment relationship was not proper since his name was retained on the seniority lists; but it was not intended to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held."

The "testimony" referred to was obviously that adduced at Gibson's FELA trial, since none was taken in the NRAB proceedings.

The position thus taken by the First Division is that Gibson is bound by testimony offered at his trial to the effect that he was permanently disabled from railroading.

* * * * * * *

It is a sound principle that an employee is estopped to assert a right to return to work after pursuing an FELA claim in which he holds out his inability to work and re-

covers a large sum of money in satisfaction of his claim; but when the recovery is nominal or unsubstantial, the jury's purpose may be ambiguous, or it may be clear as a matter of reason that compensation for serious, long-term injury was not contemplated. The doctrine of estoppel was not intended to bind a litigant to a position not successfully maintained. Under the construction of the estoppel doctrine endorsed by the First Division, an employee would in effect forfeit all rights under his labor contract by the filing of an FELA action against his employer.

* * * * * * *

We think that under the facts of this case the First Division's summary disposition of Gibson's claim by application of the bar of estoppel was clearly arbitrary. The verdict of the jury rendered at Gibson's FELA trial is ambiguous on its face. Gibson has not received a medical examination for the benefit of this record in eighteen years. There is absolutely nothing in the record to justify a finding that this employee is permanently disabled from railroading.

* * * * * * *

In the case at bar there has been no decision on the merits with respect to Gibson's claim that he had been wrongfully removed from service. There has been only summary disposition of the claim upon the theory that it is barred upon its face by estoppel.

* * * * * * *

A controversy arising under labor contracts in effect pursuant to the Railway Labor Act or other labor legislation calls for an adjustment of the rights and interests of the parties in the light of relevant considerations of public policy. The Congress has for this reason provided for disposition of these disputes by a quasi-judicial body. The NRAB is charged by statute with the responsibility of

adjusting the rights of the parties to a dispute within its jurisdiction; this Court has the responsibility to insure that this is done within the framework of the statute and of underlying public policy. We think that that policy is frustrated if we permit the Board to dispose of these disputes in such summary manner as was employed here. Gibson had a right to pursue his FELA remedies. He also had a right to enjoy the benefits and immunities of his labor contract. Congress did not intend that these rights should be mutually exclusive. For the Railroad to discharge Gibson out of retribution would be a clear contravention of federal law. We do not prejudge the merits of the controversy, we simply find that on this state of the record the First Division's determination that Gibson is permanently disabled from railroading is arbitrary and without basis in reason or fact.

* * * * * * * *

We hold that a District Court has jurisdiction to set aside an award of the National Railroad Adjustment Board which is clearly arbitrary as being without foundation in reason or fact, and upon that basis we set aside the award of the First Division and remand this cause to it with instruction to make new and appropriate findings as to the nature and extent of Gibson's present disability, if any, to work as a locomotive engineer and as to whether he has been wrongfully withheld from service in violation of the contract between the Union and the Railroad.

It Is So Ordered.

Entered this 17th day of June, 1970.

* * * * * * * *

APPENDIX D

EXHIBIT B

J. L. Gibson,
Plaintiff,
vs.
Missouri Pacific Railroad Company,
Defendant.
Civil Action.
No. 5176.

Order Amending Memorandum Opinion and Order

On this, the 10th day of July, 1970, the Court being of the opinion that the Court's Memorandum Opinion and Order of June 17, 1970, in the above cause, is an appealable, final order, but it appearing to the Court that there may be a question as to whether same is an appealable order, and the defendant having orally moved the Court for the entry of an order permitting an interlocutory appeal from such order under the provisions of 28 U.S.C. § 1292 (b), and it appearing to the Court that the said Memorandum Order is an appealable order, upon reconsideration of the matter, and being fully advised in the premises, the Court, here and now, upon its own motion, amends the Court's Memorandum Opinion and Order of June 17, 1970, in the above cause:

It Is Hereby Ordered that the Court's Memorandum Opinion and Order are hereby amended to include the following paragraphs in addition to all paragraphs contained in the Memorandum Opinion and Order as originally filed:

The Court is of the opinion that the Memorandum Opinion and Order herein involves controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation; and being of the opinion that leave should be granted for such an interlocutory appeal from such order:

It Is, Therefore, Further Ordered that leave be, and the same is hereby granted unto the Defendant to appeal from such order in accordance with the provisions of 28 U. S. C. § 1292 (b), and no further proceeedings will be had in this cause in this Court until such appeal shall have been terminated finally by the appellate court to which such appeal may be taken.

Thereupon, the Defendant, Missouri Pacific Railroad Company, upon being granted leave to take the interlocutory appeal, then and there in open Court duly gave notice of appeal to the United States Court of Appeals in and for the Fifth Circuit, which said notice is here and now entered of record.

Entered this 10th day of July, 1970.

* * * * * * *

APPENDIX E

J. L. Gibson,

Plaintiff,

vs.

Missouri Pacific Railroad Company,

Defendant.

Civil Action. No. 5176.

NOTICE OF APPEAL

Notice Is Hereby Given that Missouri Pacific Railroad Company, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Memorandum Opinion and Order entered in this action on the 17th day of June, 1970, as amended by an order entered in this action on July 10, 1970.

This 16 day of July, 1970.

* * * * * * *